STEPS TO AN EFFECTIVE SETTLEMENT CONFERENCE: AT THE TABLE

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I. INTRODUCTION.

In my last article, I discussed steps the court and counsel should take to prepare for a settlement conference. In this article, I describe actions the court and counsel should take at the settlement conference to enhance the likelihood that a settlement is achieved.

II. STEPS THE COURT CAN TAKE.

There are at least seven steps that a judge can take to make the settlement conference effective.

First, as I described in my last article, the court should use a written standing order which requires the parties to do their homework before the conference begins. Requiring the parties to exchange written settlement demands and offers prior to the

conference and requiring the attendance of clients with full authority will go a long way towards insuring that meaningful discussions take place.

Second, the court must set aside sufficient time to enable the settlement process to operate. I conduct my settlement conferences in a mediation format, and I have found that within one to two hours I can generally settle a case or determine that settlement is not currently feasible. In a mediation format, you must allow sufficient time for the court to give an opening statement to explain the process, for the parties to make their opening statements, for discussion between all parties, for separate caucuses with the court, and for a final session to confirm the settlement terms. It takes time for parties and their counsel to digest the information they receive and to re-evaluate the options they face. Setting aside sufficient time will insure that the parties and counsel have an ample opportunity to settle the case. Resolution of disputes which have gone on

for months and years require the concentrated attention of the court and the parties. As a result, I generally schedule two hours for each settlement conference.

Third, the court should provide a clear opening statement which explains the process and the ground rules. The court should explain whether the process will be 1) *facilitative,* in which the court will aid the parties in communicating with each other, but will not make a recommendation or 2) *evaluative,* in which the court will make a settlement recommendation. I generally explain to the parties that today they control their own destinies regarding settlement and commit them to the proposition that they have a serious desire to settle the case. I encourage the parties to be open and frank in their discussions by explaining that the proceedings are confidential and statements made will not be used in discovery and will be inadmissible at trial. I tell them that counsel and clients will each be given an opportunity to express their views. I

encourage the parties to address their remarks to each other, not to the court, and I insist that they not interrupt each other. I explain that I will conduct separate caucuses and will engage in shuttle diplomacy to see if a resolution can be achieved. I invite their questions regarding procedure. I want to be sure that neither counsel nor the parties are surprised by the process.

Fourth, the court must maintain its impartiality and should not coerce settlements. The decision as to whether to settle belongs to the parties, with input from counsel. The court must maintain its neutrality throughout the process. I ask open-ended questions designed to stimulate discussion. I therefore use a facilitative style, and I only become evaluative if both sides request my input after an impasse is reached. In this way, the court does not become a hindrance to the settlement process by providing an early evaluation, which places one of the parties in a defensive posture. In the separate caucuses I

ask the parties to discuss the view expressed by the other side and make certain the party understands the risks of further litigation. Even if the case is not settled, I want to be sure the parties are not later surprised by future steps in the litigation process.

Fifth, the court should allow the parties to do the talking. I have found the most effective settlement conferences are those in which I talk the least. If the parties are speaking to one another, analyzing the various issues and discussing possible resolutions, they can often reach resolution without much input from me.

Sixth, in the event an agreement is reached, I make sure all settlement terms are reviewed and confirmed with counsel and the parties in a joint session at the conclusion of the conference. I ask one of the attorneys to prepare and deliver to all parties a written confirmation of the settlement terms within one business day. I give the other side one business day

thereafter to either confirm the terms or point out discrepancies. I request the parties to copy me in on these two letters. On occasion, I will place the settlement terms on the record. I do this when a party requests that it be done or where I feel that it will be helpful in assuring the existence of the agreement.

Finally, in those cases in which settlement is not achieved, I thank the parties for their willingness to participate, and I reassure them that they will receive a fair trial. A jury trial is a constitutionally protected right. I make clear that trial remains an available and viable alternative.

III. STEPS COUNSEL CAN TAKE.

There are at least six steps counsel can take to assist in securing a successful settlement conference.

First, counsel should be sure the client understands the process and has agreed upon a strategy. This should include a clear understanding of the objectives to be achieved, the

negotiating strategy to be employed and the division of responsibilities between lawyer and client. Frequently lawyer and client appear without having previously discussed settlement strategy. This is a big mistake and can lead to poor settlement results. *Mediation Advocacy* by John W. Cooley is a helpful book published by NITA which provides an explanation of how counsel can improve their settlement preparation and skills.

Second, counsel should be prepared to deliver an opening statement which is clear, concise and persuasive regarding the strengths of her client's case. She should attempt to make the other side understand the risks he faces if he proceeds. I view settlement as a means of risk avoidance. I believe counsel's role is to minimize her client's risk while maximizing risk for the other side. A strong opening statement may be the only opportunity counsel has to speak directly to the other side's client and make him aware of the risks associated with his

position. Counsel should avoid personal attacks and express a serious desire to negotiate an agreement satisfactory to all parties. An attorney who demonstrates competence and professionalism enhances her settlement prospects.

Third, counsel should understand the judge's style and whether the session is facilitative or evaluative. If the settlement conference is facilitative then emphasis must be placed on communicating with the other side. If the session is designed to be evaluative, a more legally reasoned presentation directed towards the judge is in order.

Fourth, counsel should understand that she may be negotiating through the judge and develop an effective strategy to accomplish her client's objectives. I generally do not ask the parties for a bottom line in the separate caucuses because as long as the client is present everything is negotiable. However, the parties must understand that the process is a negotiation and the judge is a conduit for counter-offers and counter-

demands. Counsel should not be afraid to ask to meet separately with her client outside the court's presence in formulating their next proposal.

Fifth, counsel should consider whether there are any creative methods of settling the dispute. One of the major advantages of settlement over trial is the ability to structure a resolution which is not limited by the relief which can be granted at trial. Structured settlements, continued business relationships and resolution of other conflicts between the parties can all be rolled into a settlement.

Sixth, counsel should insure that any agreements reached are confirmed at the conclusion in a face to face meeting and followed up by a confirming letter or a statement on the record.

IV. CONCLUSION.

The court and counsel should devote the necessary energy and time to make settlement conferences productive. An effective settlement conference not only provides clients and

counsel with an efficient means to solve problems but also creates a positive impression of our judicial system. The success or failure of a settlement conference will depend upon the preparation that takes place before the parties come together and the time and attention counsel and the court pay to the process. Judges and lawyers acting as problem solvers promote respect and confidence in our profession.

A settlement conference permits a lawyer to use all of her skills as advocate, counselor and negotiator for the benefit of her client. Lawyers should practice these skills knowing that they will be called upon more frequently than trial skills.